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### Attorney's Negligence: The Belated Appeal

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## THE NATURE AND LIMITATIONS OF THE REMEDY AVAILABLE TO THE VICTIM OF A MISUSE OF THE LEGAL PROCESS: THE TORT OF ABUSE OF PROCESS

### INTRODUCTION

The legal process is subject to various forms of misuse. A cause of action may be commenced falsely and with a malicious intention to injure the defendant. Alternatively, a specific writ arising out of the litigation may be used in an attempt to coerce an illicit result. The possibilities are too numerous to list.

In the context of a misused legal process, it does not suffice to rely upon the ability of the victim to successfully defend the malicious claim. Substantial damage may occur irrespective of the ultimate disposition of the litigation or writ. This damage remains uncompensated unless the victim is able to affirmatively assert his claim in a cause of action based upon the misuse.

This note analyzes the victim's remedy in a limited factual context—situations in which the illicit activity occurs *after* the litigation has commenced. Abuse of process, the sole tort directed at activities within this factual context, is clarified and its elements are defined. This clarification process reveals situations in which abuse of process does not apply and the victim is remediless.

### ABUSE OF PROCESS: GENERALLY

The tort of abuse of process is one of a number of torts designed to provide a remedy for a person who has been injured by an improper use of litigation. Specifically, abuse of process affords relief in those situations in which a valid legal process is properly set in motion and then misused.<sup>1</sup>

Abuse of process is one of the most obscure torts in the law. One reason for this obscurity is the failure of the courts to restrict their use of the term to a definable category of situations.

The term has been used for a variety of dissimilar situations which have in common only the fact that actionable injury was inflicted in connection with the use of judicial process and under circumstances such that the narrowly circumscribed action of malicious prosecution was inapplicable.<sup>2</sup>

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1. *Sachs v. Levy*, 216 F. Supp. 55 (E.D. Pa. 1963).

2. *Italina Star Line v. United States Shipping Bd. Emergency Fleet Corp.*, 53 F.2d 359, 361 (2d Cir. 1931).

This blanket use of the term "abuse of process" has resulted in confusion as to the elements of the tort.

## ABUSE OF PROCESS AND RELATED TORTS

### A. Introduction

The differences between abuse of process and other torts ascribed to the improper use of litigation must be noted if the elements of abuse of process are to be clarified. The courts have named four torts involving the misuse of litigation. These are: malicious abuse of process,<sup>3</sup> malicious use of process,<sup>4</sup> malicious prosecution,<sup>5</sup> and abuse of process.<sup>6</sup>

Certain jurisdictions distinguish malicious use of process and malicious prosecution.<sup>7</sup> Both torts deal with essentially the same wrongful act.<sup>8</sup> However, in jurisdictions recognizing a distinction, malicious prosecution is limited to misuses of *criminal* actions while malicious use of process is restricted to *civil* actions.<sup>9</sup> Malicious abuse of process and abuse of process are identical torts, the difference being in name only.<sup>10</sup>

### B. Malicious prosecution and abuse of process compared.

#### 1. Origin of the litigation.

As indicated in the preliminary discussion, an abuse of process occurs when a person misuses a legal process *after* the litigation has commenced.<sup>11</sup> On the other hand, a cause of action for malicious prosecution is based upon the malicious initiation of litigation.<sup>12</sup>

The two torts may be differentiated on the basis of the point at which the wrongful action of the tortfeasor occurs. For example, malicious prosecution might occur where *A* sues *B* for breach of contract,

3. Coplea v. Bybee, 290 Ill. App. 613, 8 N.E.2d 55 (1937).

4. Davison-Paxon Co. v. Walker, 45 Ga. App. 395, 165 S.E. 160 (1932).

5. Hicks v. Brantly, 102 Ga. 264, 29 S.E. 459 (1897).

6. Lakutis v. Greenwood, 9 N.J. 101, 87 A.2d 23 (1952).

7. See Georgia Loan & Trust Co. v. Johnston, 116 Ga. 628, 43 S.E. 27 (1902); Aalfs v. Aalfs, 246 Ia. 158, 66 N.W.2d 121 (1954).

8. In both "malicious prosecution" and "malicious use of process" the plaintiff must establish that: (1) the defendant caused a process to issue; (2) the action terminated in favor of the plaintiff; (3) defendant instituted the action without probable cause and with malice; and (4) the plaintiff suffered damage. See, e.g., Grove v. Purity Stores Ltd., 153 Cal. App. 2d 234, 314 P.2d 543 (1957); Carbaugh v. Peat, 40 Ill. App. 2d 37, 189 N.W.2d 14 (1963); Dwyer v. McClean, 133 Ind. App. 454, 175 N.E.2d 50 (1961).

9. See Guth v. Walker, 92 Ga. App. 490, 88 S.E.2d 821 (1955); Nix v. Goodhill, 95 Ia. 282, 63 N.W. 701 (1895).

10. Coplea v. Bybee, 290 Ill. App. 613, 8 N.E.2d 55 (1937).

11. Sachs v. Levy, 216 F. Supp. 55 (E.D. Pa. 1963).

12. Cf. Lambert v. Breton, 127 Me. 510, 144 A. 864 (1929); Walker v. American Security Trust Co., 237 Md. 80, 205 A.2d 302 (1964); Ash v. Cohn, 119 N.J.L. 54, 194 A. 174 (1937); Ellis v. Wallons, 224 N.C. 269, 29 S.E.2d 884 (1944); Jobbers Fin. Corp. v. Lane, 221 N.C. 189, 19 S.E.2d 849 (1942).

knowing that there was no breach. On the other hand, abuse of process might occur where, during the course of the breach of contract proceedings, *A* has *B* arrested and put in jail, intending to coerce a larger settlement from *B*.

## 2. Probable cause requirement.

To state a cause of action for malicious prosecution, the injured party must prove that the original action has terminated. He must also show that the original action was instituted without probable chance of success.<sup>13</sup> Neither of these factors is necessary in order to state a cause of action for abuse of process.<sup>14</sup>

## 3. Requirement of a valid process.

Facts which support an action for malicious prosecution may also support a cause of action for abuse of process.<sup>15</sup> This is true even though malicious prosecution is based upon false allegations while abuse of process is based upon a *regularly issued* process.<sup>16</sup>

This apparent contradiction dissolves when the connotation of "regularly issued" is understood. The court in *Hoppe v. Klapperich*<sup>17</sup> explained the usage of the phrase in the following terms :

The courts commonly refer to the abuse of process as being the perversion of a regularly issued process, but it seems that such language is used for the mere purpose of calling attention to the fact that the action commonly lies notwithstanding the process may have been regularly issued.<sup>18</sup>

Accordingly, abuse of process may lie where a process is issued upon false allegations and the proceedings are wrongful<sup>19</sup> throughout.<sup>20</sup>

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13. See note 8 *supra*.

14. *Granger v. Hill*, 4 Bing. (N.C.) 212, 132 Eng. Rep. 769 (1838).

15. *Hall v. Field Enterprises*, 194 A.2d 479 (D.C. Mun. App. 1953); *Ash v. Cohn*, 119 N.J. L. 54, 194 A. 174 (1937).

16. *Rock v. Abrashin*, 154 Wash. 51, 280 P. 740, 741 (1929) (emphasis added); see also *Melton v. Rickman*, 225 N.C. 700, 36 S.E.2d 276 (1945). It was stated in *Wood v. Groves*, 144 Mass. 365, 11 N.E. 567 (1887) that "it is to be assumed in such a case that the process was lawfully issued for a just cause and is valid in form and that the arrest or other proceedings upon the process was justifiable and proper in its inception." *Accord*, *Whitten v. Bennett*, 86 F. 405 (2d Cir. 1898).

17. 224 Minn. 224, 28 N.W.2d 780 (1947).

18. *Id.* at 786. In this case *A* sued *B* for allegedly stealing a watch. *B* charged abuse of process alleging *A* knew the charges were false and the real reason the action was instituted was to extort certain property from *B*. *A* contended there was no basis for an action for abuse of process unless the process was lawfully and properly issued. This contention was held to be in error.

19. See *McHann v. Allen*, 105 Conn. 177, 134 A. 810 (1926); *Branty v. Rhodes—Havery Furnace Co.*, 131 Ga. 276, 62 S.E. 222 (1908).

20. Some courts have used the term "abuse of legal process" instead of "abuse of

One fact situation could support an action for abuse of process and an action for malicious prosecution—if the process were wrongfully issued *and* subsequently perverted. For example, if *A* caused *B* to be arrested and jailed for a debt, knowing that *B* owed no such debt, *B* would have an action for malicious prosecution.<sup>21</sup> Further, if as a condition for *B*'s release, *A* extorted certain property from *B*, *B* would *also* have an action for abuse of process.<sup>22</sup>

#### ABUSE OF PROCESS: THE ELEMENTS OF THE TORT

The nineteenth century English case of *Granger v. Hill*<sup>23</sup> was the first instance in which relief was granted for an abuse of process. In *Granger* the plaintiff borrowed money from the defendant, giving him a mortgage on plaintiff's vessel as security. The plaintiff retained the registration of the vessel in his own name. Defendant attempted to collect the debt ten months before maturity. When the plaintiff was unable to pay, the defendant caused him to be arrested and jailed. As a condition for his release from prison, the plaintiff was forced to give up the registration of the vessel.

In holding for the plaintiff and establishing abuse of process as a separate tort, the court said:

This case is altogether distinct from cases of malicious prosecution or arrest in which it is always necessary to allege and prove the former proceeding is at an end. It is an action for abusing the process of law, by employing it to extort property to which the defendants had no right. That is of itself a sufficient cause of action without alleging that there was no reasonable or probable cause for the suit itself.<sup>24</sup>

Since *Granger*, abuse of process has been variously defined.<sup>25</sup> However, certain generalizations may be made for the purposes of analysis. In order to recover for abuse of process, a plaintiff must establish: (1) defendant's misuse of a valid process, properly issued by the court in

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process" which might suggest that the former could not apply to facts giving rise to a cause of action for malicious prosecution while the latter could. *See* *Lobel v. Trade Bank*, 132 Misc. 643, 229 N.Y.S. 778 (New York City Ct. 1921). However, the two terms have been used interchangeably without any attempt to make a distinction. *See* *Morphy v. Shiply*, 351 Pa. 425, 41 A.2d 671 (1945).

21. *Cf.* *Carbaugh v. Peat*, 40 Ill. App. 2d 37, 189 N.E.2d 14 (1963).

22. *Cf.* *Hoppe v. Klapperich*, 224 Minn. 224, 28 N.W.2d 780 (1947).

23. 4 Bing. (N.C.) 212, 132 Eng. Rep. 769 (1838).

24. *Id.* at 774.

25. *See* *McCartney v. Appalachian Hall*, 230 N.C. 60, 51 S.E.2d 886 (1949); *Lakutis v. Greenwood*, 9 N.J. 101, 87 A.2d 23, 25 (1952); *Farmer's Gin Co. v. Ward*, 73 N.M. 405, 389 P.2d 9, 11 (1964); *Melton v. Rickman*, 225 N.C. 700, 36 S.E.2d 276 (1945).

the course of a legal proceeding; (2) defendant's ulterior motive in misusing the process; and (3) damage to the plaintiff as a result of defendant's conduct.<sup>26</sup>

#### *A. Issuance of a "valid process."*

Abuse of process is defined as a misuse of a validly issued process. It is, therefore, important to understand the impact of the term, "valid process."

In the broadest sense, "process" refers to procedure.<sup>27</sup> Liberally construed, this term embraces all of the proceedings connected with the litigation of a cause of action.<sup>28</sup> In its narrowest sense, "process" refers to individual writs issued by the court during or after the litigation.<sup>29</sup>

Although there is authority to the contrary,<sup>30</sup> it is in this narrow sense that the term "process" is used in a discussion of abuse of process.<sup>31</sup> Typically, an action for abuse of process is limited to situations involving the misuse of a specific writ. Accordingly, an abuse of process is commonly found in situations where the writs of garnishment,<sup>32</sup> attachment<sup>33</sup> or execution<sup>34</sup> are misused.

The broad construction of the term "process" is illustrated by the case of *Spellens v. Spellens*.<sup>35</sup> In *Spellens*, a wife brought an action seeking separate maintenance. Subsequently, the husband initiated a separate action to recover possession of certain personal property. The husband offered to discontinue his action if the wife would reciprocate. The wife cross-complained for abuse of process, alleging that the true purpose of her husband's action was to coerce her discontinuance of the original action. In sustaining the wife's claim for abuse of process, the court stated:

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26. *E.g.*, *Clikos v. Long*, 231 Ala. 424, 165 So. 394 (1936).

27. *E.g.*, "Process" is the means through which a court compels appearance of a party. *Crown Laundry v. Robertson*, 205 Ga. 214, 53 S.E.2d 116 (1949); *McKenna v. Cooper*, 79 Kan. 847, 101 P. 662 (1904). "Process" is any means of acquiring jurisdiction. *Ogdon v. Gianakos*, 415 Ill. 591, 114 N.E.2d 686 (1953). The term "process" includes all writs. *Phillips v. Hiatt*, 83 F. Supp. 44 (D. Del. 1949).

28. *See Cutler v. Cutler*, 28 Misc. 2d 526, 217 N.Y.S.2d 185, 188 (Sup. Ct. 1961); *Mobley v. Jackson*, 40 Ga. App. 761, 151 S.E. 522, 524 (1930).

29. *Sterns v. State*, 23 Okla. 462, 100 P. 909, 914 (1909).

30. *Spellens v. Spellens*, 49 Cal. App. 2d 210, 317 P.2d 613 (1957).

31. *Blackstock v. Tatum*, 396 S.W.2d 463, 467 (Tex. Civ. App. 1965).

32. *Williams v. City Stores Co.*, 192 A.2d 534 (D.C. Mun. App. 1963) (garnishment of wages for a debt known not to be owed).

33. *Malone v. Belcher*, 216 Mass. 209, 103 N.E. 637 (1913) (attachment sued out to prevent the transfer of the property attached and not to secure the debt).

34. *Little v. Sowers*, 167 Kan. 72, 204 P.2d 605 (1949) (procuring wrongful execution on a void judgment).

35. 49 Cal. App. 2d 210, 317 P.2d 613 (1957).

The improper purpose of a [misuse of a process] usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club. There is in other words a form of extortion.<sup>36</sup>

In failing to require the misuse of a specific writ, the *Spellens* court recognized the existence of the tort of abuse of process in situations involving a wrongful use of an entire law suit.

Abuse of process, however, is generally not accorded the broad scope of application indicated by the *Spellens* court. The typical position was succinctly stated in *Blackstock v. Tatum*:<sup>37</sup>

Abuse of process consists not in the filing and maintenance of a civil action, but rather in the perversion of some process issued in the suit after its issuance. *The process referred to in the cases is not the filing and maintenance of a civil action but in the wrongful use of a writ issued in the suit.*<sup>38</sup>

#### B. *Illegal and perverted use of the process.*

The "gist" of an action for abuse of process is the wrongful use of the process to effectuate an objective which is an improper function of the particular process.<sup>39</sup>

A wrongful use is found under a variety of circumstances. Illustrative of these is the situation involving an excessive attachment. Although excessive attachment may form the basis for a cause of action for abuse of process,<sup>40</sup> the line beyond which the attachment becomes excessive is unclear. In *Quaranto v. Silverman*<sup>41</sup> the attachment of property worth \$800 to secure an obligation of \$356.30 was not excessive and did not constitute an abuse of process.

An attachment for an amount greater than the debt owed is allowed to provide for the possibility that interest and taxable costs might raise

36. 317 P.2d at 626 (court's emphasis).

37. 396 S.W.2d 463 (Tex. Civ. App. 1965).

38. *Id.* at 467 (emphasis added).

39. *Cf. Braswell v. Mason Kommers Tire Co.*, 56 Ga. App. 593, 193 S.E. 377 (1937); *Berhrandt v. Rassmussen*, 234 Minn. 128, 24 N.W.2d 779 (1951); *Cardy v. Maxwell*, 9 Misc. 2d 329, 169 N.Y.S.2d 547 (Sup. Ct. 1957); *Morman v. Baran*, 35 N.Y.S.2d 906 (Sup. Ct. 1948); *Geier v. Jordan*, 107 A.2d 440 (D.C. Mun. App. 1954).

40. *Saliem v. Glovsky*, 132 Me. 402, 172 A. 4 (1934) (property valued from \$1,000 to \$1,200 was attached under a command to attach a value of \$70). Excessive attachment will also support the common law tort of "wrongful attachment." *Spaids v. Barrett*, 57 Ill. 289 (1870).

41. 345 Mass. 423, 187 N.E.2d 859 (1962).

the amount owed.<sup>42</sup> If the interest and costs do not justify the excess, the defendant may move for a reduction of the amount attached, thereby reducing the future hardship.<sup>43</sup> Abuse of process would then provide a remedy for the damages that were incurred prior to, or were unavoidable by the reduction.

In addition to excessive attachments, wrongful use is found where the defendant has levied on and sold property that was not subject to levy and sale.<sup>44</sup> Further examples of a wrongful use are the procuring of the arrest of the plaintiff in order to compel him to abandon a claim of right<sup>45</sup> and the attachment of property in an attempt to enforce a claim that is known to be groundless.<sup>46</sup>

### *C. Proof of malice.*

The extent to which the wrongful use of the process must be actuated by malice is unclear. Proof of malice is essential to state a cause of action for abuse of process.<sup>47</sup> However, the requirement of malice is satisfied if the plaintiff proves that the process was intentionally or willfully misused.<sup>48</sup> The intent to misuse a process provides a basis from which malice is inferred.<sup>49</sup> On the other hand, malice cannot be inferred from a mere mistake.<sup>50</sup> Apparently then, the requirement of malice merely limits abuse of process to the realm of intentional torts.<sup>51</sup>

### *D. Ulterior motive.*

In addition to proving wrongful and malicious use, the plaintiff

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42. *Swartz v. Brockton Sav. Bank*, 318 Mass. 66, 60 N.E.2d 362 (1945) (attachment of \$110 for a claim of \$26).

43. *Quaranto v. Silverman*, 345 Mass. 423, 187 N.E.2d 859 (1962).

44. *Coplea v. Bybee*, 290 Ill. App. 613, 8 N.E.2d 55 (1937).

45. *White v. Apsley Rubber Co.*, 181 Mass. 339, 63 N.E. 885 (1902); *See also Flynn v. Songer*, 399 S.E.2d 491 (Ky. 1966) (arrest of a credit manager who had instituted garnishment proceedings to coerce a dismissal of the garnishment).

46. *Reardon v. Sadd*, 262 Mass. 345, 159 N.E. 751 (1938).

47. *See, e.g., Malone v. Belcher*, 216 Mass. 209, 103 N.E. 637 (1913); *Keller v. Butler*, 246 N.Y. 249, 158 N.E. 510 (1927); *Robert & St. John Motor Co. v. Bumpass*, 65 S.W.2d 399 (Tex. Civ. App. 1933).

48. The court in *Coplea v. Bybee*, 290 Ill. App. 117, 8 N.E.2d 55 (1937), stated: The term "malice" in this connection is not to be given its ordinary meaning, but is to be extended so as to include willfulness. Actual malice is unimportant if the process is willfully used to accomplish the purpose intended since unlawful acts willfully done are to be deemed malicious as to those injured thereby.

8 N.E.2d at 59. *See Marlatt v. Weickgenant*, 147 Mich. 266, 110 N.W. 1061 (1907); *Dean v. Kockendorfer*, 237 N.Y. 384, 143 N.E. 229 (1924); *Pittsburg, J. E. & E. Ry. Co. v. Wakefield Hardware Co.*, 143 N.C. 54, 55 S.E. 422 (1906).

49. *Petry v. Childs & Co.*, 43 Misc. 108, 88 N.Y.S. 286 (1904).

50. *Clikes v. Long*, 231 Ala. 424, 165 So. 394 (1936) (plaintiff's property wrongfully attached through a mistake).

51. *Id.*



must show that the misuse of the process was the result of an ulterior or concealed motive.<sup>52</sup> Restated, the ulterior motive test is whether the process was used to accomplish a collateral objective that is beyond the normal purview of the process.<sup>53</sup> This may be established directly or by inference.<sup>54</sup>

### 1. Direct proof of motive.

The ulterior motive was established directly in *Coplea v. Bybee*.<sup>55</sup> Here the plaintiff proved that the defendant levied on and sold property which was not properly subject to levy and sale. The plaintiff further proved that the defendant's purpose in obtaining the illegal levy and sale was to affect the sale of the property rather than to fulfill the claim that he had against the plaintiff. This illicit purpose constituted the defendant's ulterior motive.

In *Lader v. Benkowitz*,<sup>56</sup> the plaintiff proved that the misuse of a warrant of arrest was intended to coerce payment of an unfounded claim. Here again, proof of the purpose for which the process was misused directly established the collateral purpose of the defendant.

### 2. Inferential proof of motive.

When the ulterior motive is shown by inference, the basis of the inference is the wrongful use of the process.<sup>57</sup> The plaintiff in *Hall v. Hollywood Credit Clothing Co.*<sup>58</sup> utilized such an inference. Here, the defendant caused an attachment to be issued under a judgment against the plaintiff. The plaintiff had the attachment quashed following a showing that the claim was unfounded.<sup>59</sup> Knowing that the claim was un-

52. *Pinental v. Hauk*, 101 Cal. App. 2d 884, 226 P.2d 739 (1951); *Hoppe v. Klapperich*, 224 Minn. 224, 28 N.W.2d 780 (1947); *Earl v. Winne*, 34 N.J. Super. 605, 112 A.2d 791 (1955); *Ellis v. Wellons*, 224 N.C. 269, 29 S.E.2d 884 (1944); and see cases cited in note 45 *supra*.

53. *Jeffry v. Robbins*, 73 Ill. App. 353 (1897); *Lambert v. Brenton*, 127 Me. 510, 144 A. 464 (1929).

54. 290 Ill. App. 117, 8 N.E.2d 55 (1937).

55. 188 Misc. 156, 66 N.Y.S.2d 713 (Sup. Ct. 1946).

56. *Glidewill v. Murry-Lacy & Co.*, 124 Va. 563, 98 S.E. 665 (1919).

57. 147 A.2d 866 (D.C. Mun. App. 1958).

58. The court stated this attachment did not constitute an abuse of process since the proceedings were used for the legally intended purpose—satisfying the judgment. 147 A.2d at 868.

59. The court stated:

The issuance of the second attachment upon a judgment at a time when there was no judgment outstanding was an abuse of process, because appellee thereby forced appellant to do something which it could not otherwise legally and regularly compel her to do, that and at a time when appellee had no right to it. Further the existence of an ulterior motive may be inferred from this action which appellee is alleged to have done with full knowledge of the situation.

147 A.2d at 868.

founded, the defendant obtained a garnishment of the plaintiff's salary. The plaintiff, claiming that this use of the writ of garnishment was wrongful, instituted an action for abuse of process. No proof was made of the ulterior purpose for which the writ was misused. However, the court held that the wrongful use of the writ gave rise to an inference of an ulterior motive. The collateral objective in this case was the collection of the groundless claim.<sup>60</sup>

### 3. No proof of motive.

Doubt is cast upon the need to prove an ulterior motive by some courts who fail to require such proof. A typical case is *Williams v. City Stores*.<sup>61</sup> The court did not mention the requirement of an ulterior motive. It found an abuse of process in the garnishment of the plaintiff's wages where the defendant knew that he had wrongfully taken a default judgment. No proof was made of any motive other than the collection of the judgment.

Whereas the *Williams* court ignored the ulterior motive requirement, other courts have specifically denied its necessity. Illustrative of this reaction is the statement of the court in *Varga v. Pareless*.<sup>62</sup> "[W]hile an ulterior motive is often present, it is not an essential element to the action."

The appellate court of Illinois reached the opposite conclusion upon facts similar to the facts in *Williams*. In *March v. Caciappo*,<sup>63</sup> the defendant, knowing that his claim was groundless, garnisheed the plaintiff's bank account. The court stated that the institution of garnishment proceedings is a normal procedure in the collection of a debt.<sup>64</sup> Without an allegation of an ulterior motive, the complaint for abuse of process failed.<sup>65</sup>

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60. The court in *Carpenter Baggot & Co. v. Hanes*, 167 N.C. 551, 83 S.E. 577 (1914), stated in a dictum that the doubt expressed as to the necessity for the coexistence of both elements of abuse of process may be removed if the unlawful and wrongful use of the process is always regarded as implying the illegal and ulterior purpose if that be essential to create an actionable wrong.

61. 192 A.2d 534 (D.C. Mun. App. 1963).

62. 137 Conn. 663, 81 A.2d 112 (1951).

63. 37 Ill. App. 2d 235, 185 N.E.2d 397 (1962).

64. The court sustained that portion of the plaintiff's complaint for malicious prosecution.

65. *E.g.*, *Baird v. Aluminum Seal Co.*, 250 F.2d 595 (3d Cir. 1957); *Sachs v. Levy*, 216 F. Supp. 92 (E.D. Pa. 1963); *Seibrand v. Eyerly Aircraft Co.*, 185 F. Supp. 538 (D. Ore. 1960); *Merz v. Merz White Way Tours*, 166 F. Supp. 600 (E.D. Pa. 1958); *Tapely v. Younmants*, 95 Ga. App. 161, 97 S.E.2d 365 (1957); *Bonney v. King*, 201 Ill. 27, 66 N.E. 377 (1903); *Hoppe v. Klapperich*, 224 Minn. 224, 28 N.W.2d 780 (1947); *Earl v. Winne*, 34 N.J. Super. 605, 112 A.2d 791 (1955); *Lichter v. Interwoven Stocking Co.*, 234 App. Div. 204, 254 N.Y.S. 375 (1934); *Garland v. Wilson*, 289 Pa. 272, 137 A. 266 (1927).

### E. Proof of damages.

An action for abuse of process cannot be sustained unless there is an allegation and proof of damages.<sup>66</sup> Abuse of process generally requires proof of special damages.<sup>67</sup> Typically, these special damages must include an actual arrest or a seizure of the plaintiff's property.<sup>68</sup>

The rationale for requiring an arrest or seizure is unclear. Apparently, this requirement is applied to abuse of process through an analogy to malicious prosecution.<sup>69</sup> In the context of malicious prosecution, an arrest or seizure is required in an attempt to avoid the possibility of an action being brought by every successful defendant.<sup>70</sup> If the defendant's remedy were not so limited, it is argued, an honest suitor would be deterred from bringing an action for fear of a counter suit.<sup>71</sup>

#### 1. Proof of arrest dispensed with.

There are instances of departure from the arrest or seizure requirement. The case of *Weiss v. Huna* is typical.<sup>72</sup> Here, the allegations were that the defendant instituted an action for the purpose of preventing the plaintiff from delivering certain shares of stock before a contractual deadline. As a result, the plaintiff suffered a loss of profits which he alleged as damages. In remanding the case for trial the court stated:

If the plaintiff could prove . . . that such conduct by the defendant had damaged him, he should have established what constituted the tort of abuse of process under the law of most American courts including New York.<sup>73</sup>

Apparently, proof of lost profit would be sufficient to state a cause of action for abuse of process—before the *Weiss* court. However, this interpretation of New York law is of doubtful accuracy in view of such statements by New York courts as, "If the person not be arrested or his

66. A typical case is *Allen Co. v. Brandow*, 59 Ill. App. 2d 12, 207 N.E.2d 339 (1965), where the court stated:

An action for abuse of process will not lie unless there has been either an injury to the person or property. There must be an actual seizure of the property of the plaintiff or an arrest of his person.

207 N.E.2d at 343.

67. *Seibrand v. Eyerly Aircraft Co.*, 185 F. Supp. 538 (D. Ore. 1960).

68. *Gorton v. Brown*, 27 Ill. 489 (1862); *Abbot v. Thorne*, 34 Wash. 692, 76 P. 302 (1904).

69. *Seibrand v. Eyerly Aircraft Co.*, 185 F. Supp. 538 (D. Ore. 1960).

70. *Gorton v. Brown*, 27 Ill. 489 (1862); *Abbot v. Thorne*, 34 Wash. 692, 76 P. 302 (1904).

71. *Wetmore v. Mellinger*, 64 Ia. 741, 18 N.W. 870 (1884).

72. 312 F.2d 711 (2d Cir. 1963).

73. *Id.* at 716. Instead of retrying the case on remand, the plaintiff abandoned the claim for abuse of process and sought redress by instituting a wholly independent action. *Weiss v. Beonsel*, 344 F.2d 428 (2d Cir. 1965).

property seized, no matter how unfounded the action may be, there is no abuse of process."<sup>74</sup>

## 2. Consequential damages.

When the victim of an abuse of process proves that he was arrested or that his property was seized, he is allowed to recover all damages caused by the arrest or seizure.<sup>75</sup> He is not limited to damages directly caused by the arrest or seizure. In *Malone v. Belcher*<sup>76</sup> the plaintiff had agreed to sell certain property to a third party. The defendant caused this property to be attached, intending to prevent the sale. The appellate court reversed the trial court's ruling that the plaintiff could recover only damages directly caused by the attachment. The appellate court reached its conclusion by analogizing the facts before it to an action for malicious prosecution. The successful plaintiff in a malicious prosecution action is allowed to recover for injury proximately caused to business, reputation and feelings.

[L]aw is maliciously used for a purpose for which it is not intended and *the party injured should be allowed to recover all such damages as are the natural and probable consequence of the action complained of.*<sup>77</sup>

### LIMITED SCOPE OF THE REMEDY

#### A. Special damages.

A large percentage of lawsuits never involve an arrest or a seizure of property. Accordingly, in requiring proof of an arrest or seizure, the courts have eliminated a number of situations in which a process may be abused, from the purview of the tort.

The special damage requirement does not reflect an attempt to limit the victim's remedy to situations involving the most extreme damages. Rather, this limitation is justified by an analogy to the tort of malicious prosecution.<sup>78</sup> It is an effort to minimize a honest plaintiff's fear of a countersuit by a successful defendant.<sup>79</sup>

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74. *Lief v. Jacobs*, 61 N.Y.S.2d 207, 208 (1946); *Silverman v. U.F.A. E. Div. Distrib. Inc.*, 135 Misc. 814, 816, 236 N.Y.S. 18, 20 (Sup. Ct. 1929).

75. *E.g.*, *McClenny v. Innveranity*, 80 Kan. 569, 103 P. 82 (1909) (plaintiff allowed to recover damages for publicity of custody and intimidating methods of arrest); *Adelman v. Rosenbaum*, 133 Pa. Super. 386, 3 A.2d 15 (1938) (plaintiff's nervousness and upset condition taken into account for damage in abuse of process). *See also* *Ingo v. Kosh*, 127 F.2d 667 (2d Cir. 1942); *Giddings v. Freedly*, 128 F. 355 (2d Cir. 1904); *McGann v. Allen*, 105 Conn. 177, 134 A. 710 (1926).

76. 216 Mass. 210, 103 N.E. 637 (1913).

77. *Id.* at 638 (emphasis added).

78. *Seibrand v. Eyerly Aircraft Co.*, 185 F. Supp. 538 (D. Ore. 1960).

79. *Wetmore v. Mellinger*, 64 Iowa 741, 18 N.W. 870 (1884).

Viewed in this perspective, the special damage requirement is an inappropriate restriction of the victim's remedy. Unlike malicious prosecution, abuse of process does not lie for maliciously *causing* an action to commence. Instead, abuse of process lies for a wrongful use of a process *already issued*. Thus, the honest suitor is not exposed to an action for abuse of process merely by his bringing an action—as would be the case with respect to malicious prosecution. Moreover, this requirement may coerce the honest plaintiff to forego efficient enforcement of his claim through an arrest or seizure. Finally, the special damage requirement leaves the dishonest plaintiff free to pursue his illicit schemes with impunity—by merely avoiding the use of an arrest or seizure.

*B. Specific writ requirement.*

A legal proceeding as a whole is subject to use as a threat or a club to the same extent as is a specific writ. One example of this is the strike suit—an action by a stockholder of a corporation against the directors of the corporation, not to recover for the cause stated in the complaint, but for an ulterior motive.

Abuse of process is the only tort directed toward illicit activities where the misuse occurs after the litigation commences.<sup>80</sup> However, because of the specific writ requirement, abuse of process does not provide a remedy where an entire litigation has been misused. Accordingly, any injury caused by a misuse of an entire litigation after the litigation has commenced, is remediless.

CONCLUSION

The legal process may be used in various illicit ways to inflict injury upon one of the parties to the action. When this injury is caused by activities occurring after the litigation begins, the tort of abuse of process provides the sole remedy for the victim. However, in many situations, the abuse of process remedy is unavailable. It is suggested that the restrictions limiting the scope of the tort may be inappropriate and should be the subject of re-evaluation.

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80. Even if a plaintiff has an ulterior and malicious motive in bringing an action there is not abuse of process if the action is confined to its regular and legitimate function. *Edmonds v. Delta Democrat Publishing Co.*, 230 Miss. 583, 93 So. 2d 171 (1957).